No. 87-1421

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CITY OF COLUMBUS, OHIO, et al.,
Petitioners,

vs.

ANN BRUNET, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALEXANDER M. SPATER
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
614/221-1160
Counsel of Record

KATHALEEN B. SCHULTE
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
614/221-1160

April 8, 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statute:

ADDITIONAL STATUTE INVOLVED

In addition to 28 U.S.C. §1291 cited by Petitioners, this Petition involves the following statute:

28 U.S.C. §1292. Interlocutory decisions.

(a) Except as provided in section (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termina-

tion of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory ordr, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

STATEMENT OF THE CASE

Because Petitioners misstate the findings of the district and appeal courts below in several instances, Respondents shall briefly describe the path by which this matter has travelled to this Court.

Respondents, women who had sought but were denied positions as entry level firefighters with Petitioner City of Columbus, challenged the hiring practices of Petitioners, alleging discrimination on account of sex in these practices, specifically the testing procedures utilized by Petitioners from 1979. Following a trial on the merits in February, 1986, the district court held that the entry level test administered in 1984 violated Title VII, 42 U.S.C. §2000e and that the test administered in 1980 did

not. Specifically, the district court held that the 1984 test had an adverse impact on women, App. at pp. 59a-60a, and was not job related. Id., at pp. 144a-145a.

In light of the district court's findings and conclusions, the court requested of the parties written proposals for the court's consideration in fashioning a remedy. App. at p. 149a.

It was at this point that the district court was informed by Petitioners for the first time that, following the trial but before the district court's opinion referred to above, the Petitioners voluntarily administered a different test (referred to as the 1986 test) for hiring of entry level firefighters. Petitioners informed the district court that they would not be using the 1984 test for further hiring.

On May 30, 1986, the district court entered an order enjoining the Petitioners from using the new 1986 test until such time as the test was shown to be job related. App. at p.167a. It further required Petitioners to score the test on a pass/fail basis until and unless Petitioners could produce evidence sufficient to justify rank-ordering of test scores. App. at p. 165a.

Petitioners in their remedy proposal had offered to validate rank-ordering in the future by producing a predictive and concurrent criterion-related validity study. The district court adopted their offer stating that if they are able to validate rank-ordering, "they may then apply to the Court for an Order permitting ranking." App. at p. 166a. (On August 3, 1987, the day before oral argument before the Court of Appeals, Petitioners filed with the district court

their "Study on Predictive and Concurrent Criterion-Related Validity.")

Petitioners filed notice of appeal to the Sixth Circuit Court of Appeals on June 13, 1986. However, following the filing of their notice, they sought from the district court a stay of its prior orders so that they might hire fire-fighters pending compliance with the district court's requirements and pending appeal.

Based upon such motion, the district court modified the earlier injunction and allowed interim hiring, but required Petitioners to offer the 1984 women applicants an opportunity to take the 1986 test, and to hire a number of 1984 women who passed the test and would have been hired but for the discriminatory 1984 test. Importantly, Petitioners did not appeal nor seek a stay of the modi-

fied injunction nor the other requirements of the May 30, 1986 injunction and proceeded to comply with them.

Thereafter Petitioners complied with all requirements of the district court's order and injunction, including the proportional female hiring requirement, without protest nor further appeal. They hired the first of the 1984 women applicants in January, 1987, without requesting a stay of the district court's hiring requirements.

Following the Petitioner's voluntary compliance with both the May 30, 1986 injunction and the district court's modification, an evidentiary hearing was conducted in March, 1987, to determine the validity of the new 1986 test pursuant to the earlier injunction of May 30, 1986. Pursuant to the evidence produced by both parties, the district court held, on May 21, 1987, that the 1986 test

was not content valid as administered and enjoined use of it in hiring. App. at pp. 248a-249a. Additionally, the district court enjoined further interim hiring until the terms of that order were complied with. Id., at p. 249a. The Petitioners voluntarily complied with the terms of that order without protest nor appeal, and on June 12, 1987, the district court, finding that the Petitioners "satisfied the terms of the Court's Order of May 21, 1987 with respect to the necessary calculations," vacated the injunction against the initiation of interim classes. Id., at p. 260a.

These subsequent orders of the district court, although not before this Court on Petitioners' instant Petition, are relevant to the two critical issues herein, namely: 1) whether or not the district courts' order of May 13, 1986

was a final order; and 2) whether or not the injunction of May 30, 1986, was mooted by Petitioner's compliance with it as well as the fact that the injunction was superseded by the court's later injunction of May 21, 1987.

SUMMARY OF THE ARGUMENT*

This Petition for Writ of Certiorari involves the question of whether or not the per curiam opinion of the Sixth Circuit Court of Appeals dismissing the appeal of the Petitioners herein was in error.

Initially, Petitioners assert that there exists a conflict among the circuits and this Court concerning the decision of the Court of Appeals below. However, no discussion of this asserted conflict is presented and a review of the cases cited by Petitioners evidences no such conflict.

---

*Petitioners fail to produce a summary of the argument in their Petition. Thus, Respondents suggest the following as the appropriate framework in which to review the questions raised by Petitioners.

Petitioners assert that the Court of Appeals' holding was error for three reasons:

I. The appeal issues were not moot and, even if the issues were mooted by Petitioners' actions, such actions were involuntary.

II. The holding improperly results in a res judicata effect on their rights to further review.

III. The district court decision was final for purposes of review by the appellate court.

Respondents meet these assertions with the following arguments:

I. The injunction of May 30, 1986 was mooted by Petitioners' voluntary acts, including their unilateral discontinuation of the use of the 1984 test and their voluntary compliance with the terms of the injunction. In addition, the district court's later injunction of May

21, 1987, superseded the hiring requirement of the earlier injunction. Thus, not only is the earlier injunction moot, but, even if it were not moot, the Court of Appeals could not grant relief to Petitioners since the requirements of the earlier injunction were superseded and continued by the later injunction.

II. Petitioners' failure to move for vacation of the district court judgment renders the judgment final for purposes of future disputes between the parties. Any harm resulting from this res judicata effect was the result of Petitioners' acquiescence in the dismissal of the appeal without remand. Moreover, Petitioners fail to show how they have been harmed.

III. The ongoing litigation on the merits at the district court level subsequent to the May 13, 1986 opinion and

order is prima facie evidence that such order was not final. Thus, that order did not "end the litigation on the merits and leave nothing for the court to do but execute the judgment." Catlin v. United States, 329 U.S. 229 (1945).

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS CORRECTLY DISMISSED PETITIONERS' APPEAL.

A. Petitioners Erroneously State that the Court of Appeals Dismissed as Moot Petitioner's Entire Appeal, When the Plain Language of the Court of Appeals' Opinion Found that All but the Injunction Was Not a Final Appealable Order.

The Petitioners confuse the matters before the Court of Appeals and fail to address the very statute upon which the Court based its opinion. In their Petition for Writ, the Petitioners cite 28 U.S.C. §1291, Final decisions of district courts, but fail to cite 28 U.S.C. §1292, Interlocutory decision, upon which the Court of Appeals based its findings.

Briefly stated, the Court of Appeals found that the District Court's Opinions and Orders of May 13 and May 30, 1986, were not final decisions:

> At the time of these judgments the District Court had not rendered a final decision. Indeed the litigation is still pending before the District Court. A final decision is one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' [Citation omitted.]

App. at p. 4a. Since the litigation on the merits had not terminated before the district court, the Court of Appeals reasoned, relying on 28 U.S.C. §1292, it had jurisdiction to hear these appeals

> only if they are from 'interlocutory orders[s]... granting, continuing, refusing or dissolving injunctions or refusing to dissolve or modify injunctions' under 28 U.S.C. §1292(a)(1), if they fall within the collateral order doctrine, or if they are from judgments on separate counts and the District Court has certified in accordance with Fed. R. Civ. P. 54(b) that there is no just reason for delay.

App. at p. 5a. Thus, the Court of Appeals found that the only portion of the appeal which was within its

jurisdiction was the district court's injunction of May 30, 1986, enjoining hiring until and unless Petitioners could show the job-relatedness of their voluntarily administered 1986 test. The Court of Appeals thus treated Petitioners' appeal as one solely from the injunction, the remainder of the district court's opinion and order being non-final.

B. The May 30, 1986 Injunction was Moot Because Petitioners Voluntarily Complied with the Requirements and Because the Injunction was Superseded by a Later Injunction of the District Court.

In concluding that the injunction was moot, the Court of Appeals stated:

> This [May 30th, 1986] injunctive order was appealable. However, it is now moot. The city has complied with part of the order by developing a test which the District Court has found to be content-valid and by administering it to the 1984 applicants. At oral argument

> this Court inquired of the City as to whether there was any part of the order which has not already been performed. The City conceded that the only portion of the order which is not moot is the requirement that they hire a certain proportion of women. However, the present requirement to hire a certain proportion of women arises from the District Court's Opinion and Order of May 21, 1987. That later provision would require present hiring even if the court were to vacate the injunction of May 30, 1986. Thus the entire May 30th injunction is moot.

App. at pp. 7a-8a.

The Petitioners' assertion that they complied with the injunction of the district court involuntarily and under protest is contrary to the facts before this Court. Prior to the district court's initial finding with regard to the 1984 test, Petitioners voluntarily and affirmatively revised and administered a new test. Following the district court's findings on liability, Petitioners offered to produce evidence

to the court of the content validity of the 1986 test, as well as concurrent and predictive criterion-related validity evidence with respect to their desire to rank-order test results.

Moreover, when the district court required Petitioners to set aside positions for 1984 women applicants in the interim hiring phase of this litigation, Petitioners hired without objection two women applicants (one from the 1984 list and one from the 1986 list) pursuant to the district court's orders.

A review of the record below shows that Petitioners at no time objected to nor sought a stay of the district court's injunction requiring them to hire these women during the interim hiring phase. The Court of Appeals correctly found that Petitioners had complied with the terms of the May 30, 1986 injunction at the time of oral argument.

The only point at which Petitioners objected to the hiring requirements of the district court was after the court's later injunction of May 21, 1987 (which is not reviewable in this appeal) continuing the requirement of proportional hiring of 1984 women applicants. As the Sixth Circuit Court of Appeals correctly pointed out, however, even if it vacated the May 30, 1986 injunction, the hiring requirement was continued by the injunction of May 21, 1987. Thus, the Court of Appeals could have provided no relief to Petitioners.

Petitioners' assertion that their compliance with the district court's holdings was involuntary is for the purpose of attempting to remove themselves from the purview of the holdings in Western Addition Community Organization v. Alioto, 514 F.2d 542 (9th

Cir. 1975) and International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977), in which the courts held that voluntary compliance renders an appeal issue moot.

A review of these cases, however, supports the Court of Appeals' decision below. Petitioners' attempt to distinguish Alioto, supra, which held that voluntary performance of an act sought to be appealed renders a case moot, is unsuccessful. This is precisely what happened in this case. Petitioners voluntarily and unilaterally replaced the 1984 test. In addition, they performed the acts required by the May 30, 1986 injunction without seeking a stay. The interim order of the district court modified the injunction and allowed Petitioners to hire pending completion of the requirements of the injunction, but it did not stay the requirements. The

Petitioners completed every step of the injunction without seeking a stay of those requirements. Thus, Alioto buttresses the holding of the Court of Appeals and does not support Petitioners' argument that their acts were involuntary.

Moreover, International Harvester is inapplicable herein since the appellants' compliance there was only after the denial of a stay. In the instant cause, Petitioners never even sought a stay of the requirements of the injunction of May 30, 1986 of which they complain. As the Court of Appeals correctly found, the only point at which Petitioners sought a stay was after the later injunction of May 21, 1987.

Thus, Petitioners have failed to show why the Court of Appeals' dismissal for mootness was error when Petitioners had

themselves mcoted the issues by their voluntary and affirmative act. Federal courts have consistently held that a party should not be able to unilaterally destroy a judgment unfavorable to their cause, thereby depriving the other party of a final, decisive judgment. Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters, 686 F.2d 720 (9th Cir. 1982).

Petitioners correctly cite to holdings of this Court that a case can become moot where, through no fault of the parties, an event occurs in the interim resolving the issues. Burke v. Barnes, 479 U.S.___, 107 S. Ct. 734, 93 L.Ed.2d 732 (1987); Crowell v. Mader, 444 U.S. 505 (1980); Sosna v. Iowa, 419 U.S. 393 (1975). These cases likewise support the Court of Appeals' holding below. In these cases this Court found that the appeal was moot because no live case or controversy existed at the time the court

decided it. This is exactly the situation which faced the Court of Appeals below.

Petitioners are also correct in their assertion that a stay is not necessary to protect appeal rights. However, in Thibault v. Ourso, 405 F.2d 118 (5th Cir. 1983), a case cited by Petitioners in which this general rule was stated, the court dismissed as moot the appeal on the grounds that no stay was sought and the terms of the court order thus took effect. As the court pointed out, the "'consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final...'" Id. 705 F.2d at 120, quoting American Grain Ass'n v. Lee-Vac, Ltd., 630 F. 2d 245, 247 (5th Cir. 1980.) Like the appellant in Thibault v. Ourso, supra, Petitioners failed to take the

actions necessary to preserve a live case or controversy and to enable the court of appeals to reach the merits since the judgment was complied with and no longer at issue.

Finally, Petitioners argue that "in the interest of sound judicial administration," an injunction which has been subsequently mooted out by a later injunction will be heard on appeal "if 'a recurrence or a continuation of what is essentially the same legal dispute' is predictable." Investment Company Institute v. Federal Deposit Insurance Corp., 728 F.2d 518, 523 (D.C. Cir. 1984).

However, Petitioners fail to point to how, in the instant Petition, a "recurrence or a continuation" is predictable. The injunction which the Court of Appeals ruled was moot was based upon a test which the Petitioners voluntarily placed on the shelf.

Certainly, Petitioners are not suggesting that their possible removal of the 1984 test from the shelf and use again in hiring applicants is "predictable." Nor can they be suggesting that they intend at some point in the future to again use non-job related tests. This is particularly belied by their voluntary design and administration of the new, 1986 test, which was the subject of the district court's opinion and order of May 21, 1987, an order not involved in the instant matter.

Nor can they argue that they are under a continuing duty to hire additional 1984 women applicants since that requirement has been previously satisfied, pursuant to the later, May 21, 1987 injunction. That injunction is currently the subject of a later appeal to the Sixth Circuit Court of Appeals.

Respondents are at a loss to discern how the same dispute is likely to recur. As this Court stated in Hall v. Beals, 396 U.S. 45, 50 (1969), "speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide...."

In summary, Petitioners' first basis for their writ is without merit. Moreover, none of the cases cited by them is in conflict with this Court or other Courts.

II. PETITIONERS HAVE NOT BEEN DENIED THEIR RIGHT OF REVIEW OF ANY MATTERS OTHER THAN THOSE WITH WHICH THEY VOLUNTARILY COMPLIED.

In United States v. Munsingwear, 340 U.S. 36 (1950), as in the case at bar, the court of appeals dismissed petitioners' appeal as moot. The petitioner therein, like the Petitioner here, made no motion to vacate the lower court's judgment. This Court found that petitioner's failure to move to vacate the judgment amounted to an acquiescence in the dismissal. The Munsingwear Court concluded:

> The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of res judicata but the need for it in providing terminal points for litigation.

Id., 340 U.S. at 41.

In the instant cause, the Court of Appeals' dismissal without remand to vacate was proper for two reasons. First, as previously stated, Petitioners, like petitioner in Munsingwear, made no motion to vacate the lower court's judgment. Thus, Petitioners slept on their rights. While Petitioners assert that they "raised" the issue of res judicata in the Motion for Rehearing before the Court of Appeals, it is undisputed that no motion to vacate was made.

Second, the Court of Appeals' decision not to remand for vacation of the judgment was proper because there was at that time and continues to be litigation pending before the district court. In situations such as this, this Court has held that ongoing litigation at the trial court is the basis for an exception to the standard procedure of remanding

with an order to vacate. Crowell v. Mader, 444 U.S. 505 (1980).

Similarly, in Gjertsen v. Board of Election Commissioners, 751 F.2d 199 (7th Cir. 1984), Judge Posner recognized the exception to Munsingwear in a case nearly identical to the instant one. In Gjertsen, appellants sought review of a decision of the district court finding an elections statute unconstitutional and enjoining its enforcement. The defendants filed notice of appeal but did not seek a stay and the primary election, the subject of the suit, was held in the interim.

Gjertsen court found initially that the judgment of the trial court was not final, but rather was a preliminary injunction, despite the trial court's use of the words "final judgment." Since the injunction had been complied with pending

appeal, the Court of Appeals was faced with the identical situation faced by the Court of Appeals below, namely a moot injunction with live issues remaining at the district court level.

Judge Posner noted that "this leaves the question what if anything we should do about the district court's decision granting the preliminary injunction." Id., at 202. In addressing this question, the court stated:

> As a general rule, when a case becomes moot on appeal, the district court's decision is vacated in order to make sure that a decision that the loser was unable to get appellate review of does not have res judicata or collateral estoppel effect in subsequent litigation between the parties.

Id. However, Judge Posner noted the exception to the Munsingwear general rule thusly:

> This case is different, however, in that the case has not become moot--only one order in the case has become moot, the preliminary

> injunction under appeal--and in such cases the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from....

Id.; accord, Cert. Grocers of Ill. v. Produce Etc. Union, 816 F.2d 329 (7th Cir. 1987); see also, Ringsby Truck Lines v. Western Conf. of Teamsters, supra, 686 F.2d at 721, in which the court refused to vacate the judgment found to be moot on appeal by appellant's own act, stating that "dismissal of the suit, as distinguished from dismissal of the appeal, might result in unfairness to appellee by subjecting him to other vexatious actions by appellant."

Petitioners have failed to show merit in this branch of their Petition. They have failed to show any conflict among the courts. Moreover, they have wholly failed to show how any res judicata effect of the Court of Appeals' dismissal can cause them harm. Again, their desire

appears to be to argue the underlying reasoning of the district court, not the judgment, which is not a proper ue of this or any other court's time. Finally, they have failed to refute the undisputed fact that they, not the Court of Appeals, failed to protect themselves from any hardship by failing to file a motion to vacate. Having thus slept on their rights, they cannot now ask this Court to do "what by orderly procedure [they] could have done for [themselves]." United States v. Munsingwear, supra, 340 U.S. at 41.

III. PETITIONERS HAVE ERRONEOUSLY ARGUED THAT THE COURT OF APPEALS APPLIED A "TECHNICAL" RATHER THAN "PRACTICAL" APPLICATION OF THE FINALITY DOCTRINE.

While Petitioners argue that a technical application has been applied, there is no showing that this is so. Rather, the Court of Appeals correctly applied a practical application as to the non-finality of the district court's decision, in light of the subsequent litigation in this action.

Petitioners correctly cite Catlin v. United States, 329 U.S. 229 (1945), in which this Court defined finality as that which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment". Id., at 233. The Sixth Circuit has adopted this application in City of Louisa v. Levi, 140 F.2d 512, 514 (6th Cir. 1944). The con-

cept of applying a practical application of finality over a technical application was enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

By Petitioner's own logic, they have failed to show how the Court of Appeals' application was anything less than practical. The Court of Appeals recognized the subsequent litigation on the merits of the 1986 test and correctly determined that the judgment of the district court was not a final one.

While Petitioners suggest that a balance should be struck between, on the one hand, preventing piecemeal review and, on the other, the danger of denying justice by delay of an appeal, Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), and Gillespie v. United States Steel Corp., 379 U.S. 1148 (1964),

they point to no such denial of justice in the instant cause. Nor do they point to any facts which would suggest that the Court of Appeals erred in holding that the decision was not final. Instead, they argue without support that the nearly two years of litigation which has transpired since the initial decision was simply the court's "execution of its judgment."

Contrary to Petitioners unsupported assertions, the litigation which has continued below has been more than simple execution and monitoring by the district court. The district court has addressed and made findings regarding the merits of the litigation. For example, an evidentiary hearing was held in March, 1987, after which the district court made a determination of liability on the 1986 test, from which another appeal was taken and is currently pending.

Moreover, since that time the district court has been asked by Petitioners to address their criterion related validity analysis for purpose of attempting to validate rank order hiring. Thus, they are currently seeking a determination on the merits from the district court, while at the same time, attempting to argue that such is simply execution of the judgment. Finally, the district court has pending before it Respondents' motion for Award of Backpay. Arguably, a final order in this litigation has still not been entered at the district court level.

Even if the district court's determination of liability with respect to the 1984 test was final, Petitioners cannot escape liability by unilaterally discontinuing use of that test. Cf., United States v. City and County of San

Francisco, 656 F.Supp. 276,286-87 (N.D. Cal. 1987).

Thus, Petitioners have failed to show how they have been harmed by the Court of Appeals' holding. Their desire to re-litigate the validity of a test not used by them in over two years is hardly a basis for taking up this Court's time. Indeed, insofar as many of the same issues are involved in the district court's later Opinion and Order of May 21, 1987, currently pending on appeal, Petitioners will be able to address these issues in that appeal.

Petitioners seek to apply a technical definition of finality by pointing to the use of the words "Judgment Entry" by the district court. However, as Judge Posner pointed out in Gjertsen v. Board of Elections Commissioners, supra, 751 F.2d at 201, even the use of the words "final judgment" will not render a judgment

final which, by its terms, does not dispose of all issues.

Petitioners urge this Court to accept their Petition in order to attack the district court's reasoning in reaching its initial judgment. However, as the Court of Appeals correctly pointed out, "appellate courts review judgments, not statements in opinions. California v. Rooney, No. 85-1835, slip op. at 3 [U.S. 1987 (per curian)]." App. at 10a.

CONCLUSION

While Petitioners have repeatedly stated that the dismissal of their appeal has caused them harm, they have not only failed to show how this injury has manifested itself, they also fail to recognize that it was by their own actions that the appeal was mooted.

And while Petitioners have stated in every count of their Petition that the decision of the Court of Appeals conflicts with the view of this Court and the Circuits, Petitioners have failed to show any such conflict. Indeed, most of the cases cited by Petitioners support the Court of Appeals' holding.

Simply put, Petitioners have by their own volition mooted the very issues they sought to appeal, and have thus forfeited their right to review. Respondents, on

the other hand, should be able to rely on the District Court's decision in subsequent litigation, and should not be denied their rights to a final judgment simply because the Petitioner are dissatisfied with -- but not harmed in any way by -- the decision of the Court of Appeals to dismiss the Petitioners' appeal.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALEXANDER M. SPATER
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
614/221-1160

Counsel of Record for
Respondents

KATHALEEN B. SCHULTE
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
614/221-1160

April 8, 1988

CERTIFICATE OF SERVICE

I hereby certify that a three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served upon Eileen A. Groves, Counsel of Record for Petitioners, by depositing the copies, with first class postage prepaid, in a United States mail receptacle this 8th day of April, 1988.

Alexander M. Spater